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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1988

THOMAS SHELLEY, et al.,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. WHERE CITY OF LOS ANGELES TOWS A MOTOR VEHICLE FOR VIOLATION OF TRAFFIC LAW AND PROVIDES A SUPERVISOR OF THE TRAFFIC ENFORCEMENT EMPLOYEE AS THE POST-SEIZURE HEARING EXAMINER, HAS THE CITY COMPLIED WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IN PROVIDING FOR A "NEUTRAL" ARBITRATOR?

2. WHERE THE CITY HAS AN ORDINANCE THAT PROVIDES THAT THE HEARING EXAMINER MUST BE A NON-CITY EMPLOYEE, BUT THE CITY CHOOSES TO IGNORE THAT ORDINANCE, DOES THE VIOLATION BY THE CITY CONSTITUTE A DENIAL OF DUE PROCESS?

3. WHERE THE CITY FAILS TO INFORM CITIZENS IN WRITING OF THEIR RIGHTS TO REQUEST THE TOWING OFFICIAL, TO CROSS-EXAMINE THE TOWING OFFICIAL, OR WHO HAS THE BURDEN OF PROOF, OR WHAT KIND OF EVIDENCE MUST BE PRODUCED, DOES THAT FAILURE ALSO CONSTITUTE A DENIAL OF DUE PROCESS?

List of Parties

The parties to the proceedings below were Petitioner, Thomas Shelley, and Respondent, City of Los Angeles. Both parties are before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

U.S. Constitution

Rules of the Court

State Constitution

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, THOMAS SHELLEY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings, on December 7, 1987, and in which Petition for Rehearing was denied on February 16, 1988.

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit, of which review is sought here, are unpublished and are reproduced in the Appendix hereto as pages 1a to 6a.

The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is unpublished and is here reproduced in the Appendix at page 7a.

The Order and Opinion of the United District Court for the Central District of California is also unpublished and is also reproduced hereto in the Appendix at pages 8a to 11a.

JURISDICTION

The denial of the Petition for Rehearing was entered February 16, 1988. This Petition for Certiorari is filed within 90 days of this date pursuant to Supreme Court Rule 20.2.4.

This Court's jurisdiction arises pursuant to 26 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the 14th Amendment of the United States Constitution, as it incorporates the Fifth Amendment by which provision no State may deprive any person of property without "due process of law."

STATEMENT OF THE CASE

I. Facts and Background.

On May 20, 1986, in Hollywood, California, Plaintiff parked his motor vehicle on a street early in the morning without any prohibitory sign. Then, later, someone from the City put u a no parking "tow-away" sign and a member of the Traffic Enforcement Division* of the Department of Transportation ("DOT") of the City of Los Angeles ("L.A.") towed the car based upon the newly put-up sign.

*It functions in conjunction with the Police Department which uses the same procedures.

In due course, Petitioner requested, and did receive, a hearing before a Supervisor in the DOT working in the same building as the Traffic Enforcement Employee ("TEE").

The Supervisor, Cheri L. Brown, conferred privately with the TEE and also privately made some checks into the records department about the sign. At the hearing, only Petitioner appeared and told his story. He was never advised of his rights, either orally or in writing, of the right to have TEE present, right to cross-examine TEE, right to know what the Supervisor discussed with TEE privately without him, right to know who had burden of proof, right to know what evidence could or could not be presented.

The Hearing Officer, Cheri L. Brown, testified upon deposition that her duties were to "ensure the traffic officers under my direction enforce the parking regulations...." E.R. 109.

The Hearing Examiner, Cheri L. Brown, testified she talked to the impounding officer, Mary Smith, privately. E.R. 139. She never advised Petitioner about this conversation. E.R. 140. The Hearing Examiner also received private reports from Special Services Department of the DOT. E.R. 129-131. These documents were never furnished Petitioner before the hearing. The Hearing Examiner stated in her deposition after the hearing that, although Petitioner was the only one who testified at the hearing, she did not pass on his credibility. She stated, "It's not for me to believe on anything." E.R. 141. She wrote up a summary, but never gave a copy to Petitioner. E.R. 142. She based her decision to find probable cause for the tow upon the records privately furnished to her by Special Services and upon a conversation she had with someone in Special Services. E.R. 143-144. She appeared to confuse the presence of the

towing signs at the time of the tow with Petitioner's contention that hours before when he actually parked, there were no signs.

At the time of the hearing, there was a Los Angeles Municipal Ordinance that required Hearing Examiners to be non-City employees. That Ordinance was ignored by the City because (as Counsel for the City stated at the oral argument before the Court of Appeals), it would have been too costly.

Petitioner never received any written statement of his rights permitting him to require the presence of the impounding officer, the right to cross-examine her, any information as to the burden of proof, any information about the secret evidence received from Special Services or the private interview with the TEE, or what kind of evidence had to be produced.

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II. Decisions Below

A. The District Court's Decision.

United States District Court filed an opinion on December 19, 1986, dismissing the case on the basis of Parratt v. Taylor, 451 U.S. 527 (1981). Neither side on appeal referred to this basis, nor did the Circuit Court of Appeals at any time.

B. The Court of Appeal's Decision

Its decision of December 7, 1987, unpublished, it held that the supervisors in the same office as the TEE can serve as hearing officials consistent with the "due process" clause in post-seizure tow hearings involving citizens versus the DOT. It cited, inter alia, Withrow v. Larkin, 421 U.S. 35, 46 (1975), to the effect that investigative and adjudicative functions can be constitutionally combined.

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REASON FOR GRANTING THE PETITION

Question of Public Importance

The Circuit Court's decision in this case involves an important question of federal law which has not been, but should be, settled by this Court. See Rule 17, Sup. Ct. Rules. Its decision is also in conflict with applicable decisions of this Court. Id. "Due process" decisions are generally appropriate for review by this Court. See, e.g., Johnson v. Bennett, Iowa (1968) 393 U.S. 253.

Petitioner was entitled to a "neutral" arbitrator. Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977). A "police officer... cannot be wholly neutral." Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

The two federal court cases on point, supporting Petitioner, Hale v. Tyre, 491 F.Supp. 622, 626 (ED Tenn. 1979) and Grant v. City of Chicago, 594 F.Supp. 1441, 1449 (ND

Ill. 1984), are totally ignored by the Circuit Court. Instead, that Court cites an FTC case where the FTC is primarily regarded as "neutral" to begin with, and where the attorneys for the FTC are appointed by the Justice Department, the executive. It also cites a disability case, a prison case, a termination of financial support for a legal services corporation, and a medical licensing board case, all of which are distinguishable on the bases of a "neutral" agency or on the basis of a benefit or service the aggrieved party was receiving.

The Circuit Court disregards the fact that this is essentially a "police" case and the Hearing Officials are "police" people who regularly supervise the foot soldiers to do what they are doing. Both the Hearing Official and the impounding official are both employed in the same traffic department, both being paid by the City, both working in the same building and both are being paid to

enforce the same traffic laws! If the Hearing Official is "neutral" in this case under the "due process" clause then any arrest, initiated by the Police, can be heard by Police Supervisors as the Hearing Judges and, according to the reasoning of the Court below, would not offend "due process," whether it be an infraction, misdemeanor or felony. Since investigative and adjudicative processes can be combined, for purposes of seizing automobiles (per Circuit Court), it most certainly can be combined for purposes of seizing persons! The Constitution demands a better reading!

The facts in this case are not atypical. The Supervisor conferred privately with the impounding official and also with Special Services in the same building with the same department. This would not be likely to occur with a non-City employee acting as the Hearing Official. There is a "built-in" bias in having police supervisors and traffic

supervisors acting as Hearing Examiners when the foot patrol people are pitted against citizens.

While we sit here debating this, throughout the State of California this basic unconstitutional procedure is taking place vis-a-vis all automobile post-seizure towing hearings. Unless this Court grants certiorari, the "due process" clause will have sustained another mortal blow.

In the context of warrants, this Court has consistently held that police supervisors cannot constitute the "neutral" official when police activity is involved. See, e.g., Johnson v. U.S., 333 U.S. 10, 13-14 (1948); Coolidge v. New Hampshire, 403 U.S. 443, 449-453 (1971). The same reason on logic in these cases should impel a similar result here.

The Circuit Court dismisses the impact of the L.A. Ordinance on the basis that that is a local matter. Can a State or City

provide for a judge learned in the law and the City disregard that by picking high school students? A person's bundle of rights arises out of state law and when that law prescribes procedures to which the citizen is entitled, can a State disregard it! See, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The Circuit Court committed grievous error in ignoring these constitutional arguments.

Finally, the bundle of "due process" rights which a citizen has includes the right to be informed in writing of the full panoply of rights required to be vouchsafed to them at the hearing, none of which was done in this case. See, Memphis Light, Gas & Water Civ. v. Craft, 436 U.S. 1 (1978); Fuentes v. Shevin, 407 U.S. 69 (1962).

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CONCLUSION

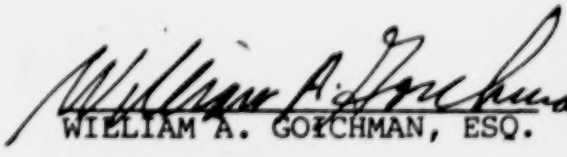
Certiorari should be granted in this case to correct an horrendously bad decision, based upon faulty authority, and bereft of logic or reason, sanctioning a horrible state practice which vitiates one of the most important basic rights guaranteed by the "Due Process," namely, the right to a "neutral" arbitrator, especially in an adversarial context, requiring adversarial input between citizen and "police."

The Circuit Court ignores the most basic difference in this case from the cases it cites. This is a "police" case, no benefit, service or privilege is being afforded or jeopardized. The "benefit," "service," "privilege" cases must be clearly and readily distinguishable. This case fits the traditional "quasi-criminal" pattern. It is a "seizure" case. A "seizure" of one's property or person does not and should not permit "investigative" and "adjudicative"

functions to be combined.

The District Court did no see any issues in this case and the Circuit Court, while seeing the issues, did not analyze under traditional and customary principles of constitutional law.

WHEREFORE, Petitioner respectfully requests this Court to grant the Petition and set this matter down for plenary consideration and correct the existing blemish upon this important escutcheon of justice.



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DATED: May 6, 1988

APPENDIX

INDEX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SHELLEY,	) NO. 87-5520
	) D.C.# V-86-4023-RG
Plaintiff-Appellant,	)
	)
vs.	) MEMORANDUM*
	)
CITY OF LOS ANGELES,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr.,
District Judge, Presiding

Argued and Submitted November 5, 1987
Pasadena, California

FILED: DEC 7 1987

Before: TANG, WIGGINS and KOZINSKI, Circuit Judges.

Thomas Shelley challenges certain hearing procedures provided by the City of Los Angeles (City), following the towing of his automobile, under 28 U.S.C. § 1983.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Shelley contends that California Vehicle Code § 22852 (West 1985 & Supp. 1987), to the extent it allows another Department of Transportation (DOT) employee to sit as a hearing officer in a post-impound DOT hearing, violates the due process clause of the Constitution. Shelley further asserts the hearing requirements of Cal. Veh. Code § 22852 impermissibly conflict with Los Angeles Municipal Code § 80.77.1(e)(1979). The district court granted summary judgment in favor of the City. We affirm.

First, we consider Shelley's due process attack on Cal. Veh. Code §22852.[1] In so far

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1 California Vehicle Code § 22852 (West 1982 & Supp. 1987) provides in part:

> Whenever an authorized member of a public agency directs the storage of a vehicle... the agency or person directing the storage shall provide the vehicle's registered and legal owners of record, or their agents, with the opportunity for a post-storage hearing to determine the validity of the storage... (a)(3)... The public agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the storage of the vehicle.

as the statute allows another DOT employee to conduct a post-impound DOT hearing, Cal. Veh. Code § 22852 authorizes a procedure that combines "investigative and adjudicative functions" in one administrative body. Withrow v. Larkin, 421 U.S. 35, 46 (1975). Ordinarily, any assertion of an unconstitutional risk of bias in such administrative adjudications carries a "difficult burden of persuasion." Id; see also, Ash Grove Cement Co. v. F.T.C., 577 F.2d 1368, 1376 (9th Cir.), cert. denied, 439 U.S. 982 (1978). Accordingly, the actions of such dual function bodies have routinely been upheld. See e.g., Withrow v. Larkin, 421 U.S. 35 (1975) (suspension of license by state medical examining board); Wolff v. McDonnell, 418 U.S. 539 (1974) (hearings under state prison discipline system); Richardson v. Perales, 402 U.S. 389 (1971) (disability claim hearing by Social Security examiner); FTC v. Cement Institute, 333 U.S.

683 (1948) (Commission proceeding against unincorporated trade association); Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 668 (9th Cir. 1980) (termination of financial support by LSC); Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1376 (9th Cir.), cert. denied, 439 U.S. 982 (1978) (FTC orders); Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1265 (9th Cir. 1977) (review by EPA regional administrator).

In light of Withrow, it is clear that agencies whose employees both investigate and adjudicate are not subject to a per se attack on due process grounds. Though the impound hearing procedure at issue here combines investigative and adjudicative functions in the same City agency, it specifically requires that the hearing may not be conducted by the agency employee who authorized the impound. Further, there is no suggestion that the DOT hearing examiner had

any personal bias or animosity against the plaintiff or that the examiner had a pecuniary interest in the outcome of the hearing. See Morrissey v. Brewer, 408 U.S. 471 (1972). Thus, the separation of functions within the DOT, authorized by Cal. Veh. Code § 22852, satisfies Withrow and comports with due process.[2]

Second, as to whether Cal. Veh. Code § 22852 impermissibly conflicts with LAMC § 80.77.1,[3] the question is improperly raised in a § 1983 suit. Because we find Cal. Veh. Code § 22852 comports with the Constitution,

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[2] An earlier due process attack on Cal. Veh. Code § 22852 was rejected by this court in 1982. Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (1982). In Goichman we found that the statute's provision for a post-impound hearing within 48 hours of request was sufficiently prompt to satisfy due process requirements. See Goichman, 682 F.2d at 1323-25.

[3] Los Angeles Municipal Ordinance 80.77.1(e)(1979) provides in part:

> "Hearing officers shall be appointed by the City and shall not be City officials, officers, or employees."

no civil rights violation remains to be addressed. If the City of Los Angeles is disregarding its own ordinance, this claim is more properly raised by way of a state court action. See Cal. Civ. Pro. Code § 1094.5 (West 1980).

The judgment of the district court is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SHELLEY, Plaintiff-Appellant, vs. CITY OF LOS ANGELES, Defendant-Appellee.	NO. 87-5520 D.C.# V-86-4023-RG ORDER DENYING PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC

Before: TANG, WIGGINS and KOZINSKI, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATE DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS SHELLEY, on behalf of himself and a class of all other persons similarly situated,	)	No. CV 86-4023 RG
Plaintiffs,	)	ORDER
v.	)	
CITY OF LOS ANGELES,	)	
Defendant.	)	

The matter came on for hearing on November 24, 1986 before the Honorable Richard A. Gadbois, Jr. on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The court, having considered all pleadings and papers on file in this case and the oral arguments of counsel for both parties, finds as follows:

1. On May 20, 1986, plaintiff parked his car on Carlos Avenue near its intersection with Vista Del Mar in the City of Los Angeles.

2. When plaintiff returned to the location where he had parked his car, he found that it had been towed, and that there were temporary street signs which were posted indicating that the area where he had parked was a temporary tow away zone.

3. After paying a sum of money to retrieve his car from the towing garage, plaintiff exercised his right to have a vehicle impound hearing where it would be determined whether there was probable cause for the tow.

4. On May 23, 1986, plaintiff attended an impound hearing conducted by Department of Transportation (DOT) Supervisor Cheri Brown.

5. DOT Supervisor Cheri Brown did not take part in the decision to impound plaintiff's car.

6. When the hearing officer ruled against him at the impound hearing on May 23, 1986, plaintiff did file an administrative mandamus action pursuant to Cal. Civ. Pro.

Code. § 1094.5.

CONCLUSIONS OF LAW

1. Any claims of improper procedure used by or findings made by the hearing officer who conducted plaintiff's impound hearing can be addressed by way of a state court action for administrative mandamus or damages. Accordingly, the plaintiff's section 1983 cause of action is dismissed under Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

2. The pendent state claims are dismissed without prejudice under United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

For the foregoing reasons, the court finds that there is no genuine issue of material fact in this case, and that the defendant is entitled to a judgment as a matter of law.

The court hereby orders that defendant's motion for summary judgment is granted in its

entirety pursuant to Rule 56 of the Federal Rules of Civil Procedure. The court further orders that judgment be entered in favor of defendant in accordance with the findings set forth in this order.

IT IS SO ORDERED.

RICHARD A. GADBOIS, JR.

United States District Judge

DATED: DECEMBER 19, 1986.

ENTERED: DECEMBER 23, 1986.

No._____

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SUPREME COURT OF THE UNITED STATES

TERM, 1988

THOMAS SHELLEY, et al.,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

I, WILLIAM A. GOICHMAN, hereby certify that on this 6th day of MAY, 1988 three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to counsel for respondents:

Jack L. Brown, Deputy City Attorney
200 No. Main Street
1800 City Hall East
Los Angeles, California 90012

Executed on MAY 6th, 1988 at Los Angeles, California.

William A. Goichman

WILLIAM A. GOICHMAN
Attorney for Petitioner
THOMAS SHELLEY, et al.